Saskatchewan
Labour Relations Board

THE UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1400, Applicant v ATCO STRUCTURES & LOGISTICS LTD., Respondent

LRB File Nos. 133-23 and 157-23; February 12, 2024
Chairperson, Michael J. Morris, K.C.; Board Members: Phil Polsom and Laura Sommervill

Counsel for the Applicant, the United Food and Commercial Workers Union, Local 1400: Heath Smith

Counsel for the Respondent, ATCO Structures & Logistics Ltd.: Dan Bokenfohr

Summary dismissal – No arguable case – Section 6-16 of *The Saskatchewan Employment Act* – Facts pled not establishing union inactive in promoting and enforcing its bargaining rights for a period of three years or more – No employees in bargaining unit during period relied upon by employer – No employees' rights to promote and enforce during period – Employer's application summarily dismissed.

REASONS FOR DECISION

Background:

[1] Michael J. Morris, K.C., Chairperson: These are the Board's reasons with respect to a summary dismissal application[1] brought by the United Food and Commercial Workers Union, Local 1400 [Union]. The Union's application stems from an application[2] brought by ATCO Structures & Logistics Ltd. [Employer] to cancel a certification order held by the Union, pursuant to s. 6-16 of *The Saskatchewan Employment Act* [Act].[3] Section 6-16 requires the Board to cancel a certification order if it is satisfied that the relevant union has been "inactive in promoting and enforcing its bargaining rights" for a period of "three years or more".

[2] The Union contends that it is plain and obvious that the Employer's application will fail on the facts alleged therein. More particularly, if there have been no employees within the bargaining unit for an extended period, as alleged by the Employer, that period cannot count as "inactivity" in promoting and enforcing the Union's bargaining rights.

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[1] LRB File No. 157-23.
[2] LRB File No. 133-23.
[3] *The Saskatchewan Employment Act*, SS 2013, c S-15.1 [Act].

[3] The relevant certification order was issued by the Board on November 12, 2015,[4] in relation to employees[5] within a specified geographic area. Prior to its issuance employees were working at a large housing complex that housed a workforce for a potash mine under construction near Jansen, Saskatchewan.[6]

[4] The Employer's application relies on the following particulars:

> *This application is made pursuant to section 6-16 of the Act. The Union has been inactive in promoting and enforcing its bargaining rights under the certification order granted by the Board on November 12, 2015, under LRB File No. 239-14 (the "Certification Order") for a period of three years or more. In these circumstances, section 6-16(2) of the Act directs that the Board "shall" cancel the Certification Order. The particulars of the union's inactivity in promoting and enforcing its bargaining rights are as follows:*
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> *-On or about December 31, 2015, before a collective bargaining agreement was concluded, the Applicant ceased operations within the geographical scope of the Certification Order.*
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> *-Prior to ceasing its operations, the Applicant entered into an agreement with the Union regarding its obligations under section 6-56 of the Act. Pursuant to that agreement, the Applicant provided all affected employees with notice of termination and/or pay in lieu of notice, letters of reference and access to resources to assist them in seeking new job opportunities and obtaining employment insurance benefits.*
>
> *-In January of 2016, the Union purported to file a grievance in relation to the amount of pay in lieu of notice that the Applicant had provided to employees upon layoff. This dispute was resolved in January of 2017 by way of a settlement agreement between the parties.*
>
> *-The Applicant had no further contact with the Union until it received a letter dated March 28, 2023, from the Union seeking to re-commence collective bargaining and requesting maintenance of membership for all employees subject to the Certification Order.*[7]

[5] The Union's position is that the above particulars disclose no arguable case for an order under s. 6-16.

Argument on behalf of the Union:

[6] The Union submits that the onus is on the Employer to establish that it abandoned its bargaining rights, for the purposes of s. 6-16.

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[4] LRB File No. 239-14.
[5] With some specified exceptions.
[6] *United Food and Commercial Workers, Local 1400 v ATCO Structures and Logistics Ltd.*, 2015 CanLII 80541 (SK LRB), at para 2.
[7] Employer's application in LRB File No. 133-23, para 5.

[7] The Union notes that the Board has considered s. 6-16 relatively recently, in *Commissionaires*.[8] In *Commissionaires*, in the context of an application under s. 6-16, the Board identified "the long-held and well understood principle that abandonment cannot be found if there are no employees in the bargaining unit".[9] Further, the Board held that it could not consider a lengthy time period when no employees were in the bargaining unit when assessing whether the Union had been inactive in promoting and enforcing its bargaining rights.[10]

[8] The Employer is relying upon a period from approximately January of 2017 until March of 2023 as counting toward inactivity on the Union's part. However, based on the Employer's pleading there were no employees within the bargaining unit during that period. According to *Commissionaires*, it cannot be counted. Therefore, the Employer cannot establish that the Union has been inactive in promoting and enforcing its bargaining rights for a period of three years or more, as required for an order pursuant to s. 6-16.

[9] In sum, the Union's position is that the Employer's application must fail based on the facts alleged therein, based on settled law.

Argument on behalf of the Employer:

[10] The Employer submits that it is not plain and obvious that its application will fail because s. 6-16 uses mandatory language requiring the Board to cancel the Union's certification order if the facts it alleges are accepted. More particularly, the Employer submits:

> *Section 6-16(2) of the Act uses mandatory language in stating that the Board "shall" cancel the relevant certification order if it is satisfied that the union has been "inactive" in "promoting and enforcing" its bargaining rights for a period of three or more years. In other words, section 6-16(2) of the Act grants the Board no discretion to decline to cancel a certification order because, in its opinion, circumstances exist to excuse the union's inactivity in promoting and enforcing its bargaining rights.*[11]

[11] The Employer submits that *Commissionaires* wrongly applied common law principles rather than the straightforward, mandatory language of section 6-16, which diverges from the common law in providing an unqualified basis to extinguish bargaining rights after three years of

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[8] *United Food and Commercial Workers Union, Local 1400 v Corps of the Commissionaires*, 2021 CanLII 15152 (SK LRB) [*Commissionaires*].
[9] *Commissionaires*, at para 122.
[10] *Commissionaires*, at para 128.
[11] Employer's written submissions, para 8.

union inactivity.[12] While *Commissionaires* relied upon *Varsteel*,[13] a previous decision interpreting s. 6-16, the Board in *Varsteel* did not carefully consider the mandatory language of s. 6-16. Finally, the Employer submits that the Board is not bound by its earlier decisions, so its application should be permitted to proceed; it is not plain and obvious that it will fail.

Relevant Statutory Provisions:

[12] The following provisions of the Act are relevant:

> ***6-16****(1) An application may be made to the board to cancel a certification order by an employee within the bargaining unit or the employer named in the certification order if the union has been inactive in promoting and enforcing its bargaining rights for a period of three years or more.*
>
> *(2) The board shall cancel the certification order if the board is satisfied that the union has been inactive in promoting and enforcing its bargaining rights in the period mentioned in subsection (1).*
>
> *…*
>
> ***6-111****(1) With respect to any matter before it, the board has the power:*
>
> *…*
>
> *(p) to summarily dismiss a matter if, in the opinion of the board, there is a lack of evidence or no arguable case;*

Analysis and Decision:

[13] The Union applies to dismiss the Employer's application pursuant to clause 6-111(1)(p) on the basis that it discloses no arguable case. The test for summary dismissal on this basis is stated in *KBR Wabi*:

> *1. In determining whether a claim should be struck as disclosing no arguable case, the test is whether, assuming the applicant is able to prove everything alleged in his/her claim, there is no reasonable chance of success. The Board should exercise its jurisdiction to strike on this ground only in plain and obvious cases and where the Board is satisfied that the case is beyond doubt.*
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> *2. In making its determination, the Board may consider only the subject application, any particulars furnished pursuant to demand and any document referred to in the application upon which the applicant relies to establish his/her claim.*[14]

[14] The Employer does not appear to dispute that application of the Board's reasoning in *Varsteel* and *Commissionaires* is fatal to its application. Its position is that *Varsteel* and

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[12] Employer's written submissions, para 10(c).
[13] *Varsteel Ltd. v United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 5917*, 2018 CanLII 127675 (SK LRB) [*Varsteel*].
[14] *International Brotherhood of Electrical Workers, Local 529 v KBR Wabi Ltd.*, 2013 CanLII 73114 (SK LRB) [*KBR Wabi*], at para 79. See also *Roy v Workers United Canada Council*, 2015 CanLII 885 (SK LRB), at para 8.

Commissionaires misinterpreted s. 6-16, and that the Board should consider its arguments in this regard rather than summarily dismiss its application. As indicated earlier in these reasons, the Employer submits that a proper interpretation of s. 6-16 does not permit the Board to ignore periods when no employees have been within the bargaining unit in determining if/when the Union has been inactive in promoting and enforcing its bargaining rights.

[15] In *Varsteel*, the Board had circumstances before it which indicated that the bargaining unit had been vacant for an extended period. It took note of its earlier decision in *Saunders Electric* in which the Board stated, amongst other things, that collective bargaining rights are granted by the Board for the benefit of employees.[15] In concluding that the union had not been inactive in promoting and enforcing its bargaining rights for three years or more, the Board ignored the period when there were no employees in the bargaining unit, stating:

> *[43] … the Board is of the view that the Employer has not proven that the Union failed to promote and enforce its bargaining rights for the Estevan employees for a period in excess of three years. …*
>
> *[44] The only evidence before the Board of the presence of employees at the Estevan location who fell within the bargaining unit came from Mr. Hasley. He indicated that there was such an employee in 2015. He did not provide further evidence regarding when this employee commenced work in this position, or whether there were previous employees in this position. Therefore, the evidence before the Board is that, at the date of the Employer's application, November 14, 2016, the alleged abandonment of this employee by the Union could only have been occurring for less than two years.*[16]

[16] Simply put, the Board considered the presence of employees within the bargaining unit as necessary for it to be satisfied that the union had failed to promote and enforce its bargaining rights with respect to them. This stands to reason, given bargaining rights are for the benefit of employees. Accordingly, the Board did not consider the absence of employees as an *excuse* for inactivity by the union. Rather, the Board considered the presence of employees within the bargaining unit as necessary for it to *conclude* inactivity on the union's part, for the purposes of s. 6-16. In other words, before there can be inactivity within the meaning of s. 6-16, there must be a reason for a union to be "active", i.e., the presence of affected employees. This conclusion was consistent with the Board's abandonment jurisprudence pre-dating the enactment of s. 6-16.[17]

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[15] *International Brotherhood of Electrical Workers, Local 529 v. Saunders Electric Ltd.*, 2009 CanLII 63147 (SK LRB) [*Saunders Electric*], at para 50, quoted in *Varsteel* at para 42.
[16] *Varsteel*, at paras 43 and 44.
[17] *Saunders Electric,* at paras 43, 47 and 77; *IBEW, Local 529 v Mudjatik Thyssen Mining Joint Venture*, 2000 CarswellSask 883 (SK LRB), [2000] SLRBR 332, at para 46; *Cineplex Galaxy Limited Partnership v International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Trades of the United States and Canada, Local 295*, 2006 CanLII 62952 (SK LRB), at para 42.

[17] In *Commissionaires*, the Board stated that it is clear, for the purposes of s. 6-16, that the focus of the inquiry must be on the use, or lack thereof, of a union's collective bargaining rights.[18] In the course of its reasons, it noted *Graham Construction*[19] acknowledged the Board's jurisprudence focusing on "failing" to bargain on behalf of employees in the bargaining unit.[20] This remained the focus in the context of the Board's analysis under s. 6-16, a provision which contemplates a union not "promoting and enforcing" its bargaining rights.[21] Accordingly, the Board did not consider periods in which the bargaining unit contained no employees as relevant to its analysis.[22]

[18] *Varsteel* and *Commissionaires* both concluded that for the purposes of considering inactivity in the context of s. 6-16, periods in which the bargaining unit contained no employees were irrelevant. This was based on the Board interpreting inactivity within the meaning of s. 6-16 as a union being inactive *when* there were employees' rights to promote and enforce through collective bargaining. Or, put another way, inactivity meaning *failing* to promote and enforce employees' rights through collective bargaining.[23] Both *Varsteel* and *Commissionaires* described the Board's power under s. 6-16 as an "extraordinary" one.[24]

[19] The Employer notes the Board's statement in *University of Saskatchewan* that it is not bound by its previous decisions.[25] While this may be the case, the Board relies on its previous decisions to promote consistency and predictability in the interpretation of the Act. Here, absent a clear and convincing argument for doing so, the Board will be reluctant to revisit the meaning attributed to "inactivity" (in the context of s. 6-16) by *Varsteel* and *Commissionaires*.

[20] The Employer's submissions with respect to why *Varsteel* and *Commissionaires* should not be followed are minimal. In essence, they are captured by the quote cited at paragraph 10 of these reasons. Put another way, the Employer contends that as long as the Union has not been actively promoting and enforcing bargaining rights, even if there are no employees in the unit on whose behalf it can act (as their bargaining agent), it "has been inactive in promoting and enforcing its bargaining rights" for the purposes of computing time for a s. 6-16 analysis.

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[18] *Commissionaires*, at para 119.
[19] *United Brotherhood of Carpenters and Joiners of America, Local 1985 v Graham Construction and Engineering Ltd.*, 2008 SKCA 67 [*Graham Construction*]. *Graham Construction* pre-dated the enactment of s. 6-16.
[20] *Commissionaires*, at paras 123-124.
[21] *Commissionaires*, at paras 126-128.
[22] *Commissionaires*, at para 128.
[23] See para 43 of *Varsteel*, quoted at para 15 of these reasons.
[24] *Varsteel*, at para 39; *Commissionaires*, at para 131.
[25] *University of Saskatchewan v Administrative and Supervisory Personnel Association*, 2021 CanLII 12946 (SK LRB) [*University of Saskatchewan*], at para 61.

[21] Respectfully, the Employer's interpretation of s. 6-16, apart from being contrary to *Varsteel* and *Commissionaires*, is somewhat simplistic. Fundamentally, it ignores that a union's bargaining rights are exercised for the benefit of employees within the bargaining unit.[26] Section 6-4, a foundational provision, acknowledges employees' right to engage in collective bargaining *through* a union. Further, the activities defined as "collective bargaining" in s. 6-1(1)(e) contemplate a union undertaking them as bargaining agent for at least one employee, not solely for its own purposes:

> *(e) "collective bargaining" means:*
>
> > *(i) negotiating in good faith with a view to the conclusion of a collective agreement or its renewal or revision;*
> >
> > *(ii) putting the terms of an agreement in writing if those terms were arrived at in negotiations or are required to be inserted into a collective agreement by this Part;*
> >
> > *(iii) executing a collective agreement by or on behalf of the parties; and*
> >
> > *(iv) negotiating from time to time the settlement of disputes and grievances of employees covered by a collective agreement or represented by a union;*[27]

[22] There is no discernible labour relations reason for a union to "promote and enforce" its bargaining rights when there are no employees who are affected by enforcement of those rights.

[23] Notably, the Act does not contain a provision which is analogous to s. 53(1)(c)(ii) of Alberta's *Labour Relations Code* (emphasis added):

> ***53(1)*** *Before granting an application for revocation, the Board shall satisfy itself, after any investigation that it considers necessary, that …*
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> *. . .*
> *(c) in the case of an application by a former employer*
>
> > *(i) the bargaining agent has abandoned its bargaining rights, or*
> >
> > *(ii) there have been no employees in the unit represented by the trade union for a period of at least 3 years.*[28]

[24] Had the Legislature intended to mandate decertification upon application by a former employer where a bargaining unit has been vacant for three years or more, it could have done

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[26] *Canadian Merchant Service Guild v Gagnon et al*., 1984 CanLII 18 (SCC), [1984] 1 SCR 509, at 526-527.
[27] Act, s 6-1(1)(e).
[28] *Labour Relations Code*, RSA 2000, c L-1, s 53(1)(c). An application for revocation of bargaining rights, whether relying upon s. 53(1)(c)(i) or (ii), can only be made by an employer or former employer if they have not bargained collectively with the bargaining agent for a period of 3 years: s. 52(5).

so. Instead, s. 6-16 focuses the inquiry on a union's lack of promotion and enforcement of its bargaining rights.

[25] As explained, *Varsteel* and *Commissionaires* stand for the principle that there can be no inactivity within the meaning of s. 6-16 when there are no employees for whose benefit a union can promote and enforce its bargaining rights. The Board acknowledges and accepts this principle. The Employer's submissions have not caused it to question it.

[26] Here, the Employer contends that the Union was inactive in promoting and enforcing its bargaining rights for in excess of three years, per s. 6-16. However, the Employer does not plead that there were any employees in the bargaining unit or former employees (for the purposes of dispute resolution) during this period for whose benefit the Union could promote and enforce its bargaining rights. Nor has the Employer suggested that its pleading could be cured by an amendment. As a result, it is plain and obvious that the Employer's application discloses no arguable case for an order pursuant to s. 6-16.

[27] The Union's application to summarily dismiss the Employer's application is allowed. An appropriate order will accompany these reasons.

[28] This is a unanimous decision on behalf of the Board.

DATED at Regina, Saskatchewan, this **12th** day of **February, 2024.**

LABOUR RELATIONS BOARD

Michael J. Morris, K.C.
Chairperson